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STANCE BEAUTY LABS, LLC and
6 BURLINGTON STORES, INC.

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9 IN THE UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 OAKLAND DIVISION
12

13 OLIVIA GARDEN, INC., a California
Corporation

14 Plaintiff,
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16 v.

17 STANCE BEAUTY LABS, LLC, a
Connecticut Limited Liability Company;
BURLINGTON STORES, INC., a Delaware
18 corporation; and DOES 1 through 25, inclusive,

19 Defendants.
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Case No. 5:17-CV-05778-HSG

**STANCE BEAUTY LABS, LLC'S
MOTION TO DISMISS FOR
IMPROPER VENUE**

Date: March 22, 2018
Time: 2:00 p.m.
Dept: Courtroom 2, 4th Floor
Hon. Haywood S. Gilliam, Jr.

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD: PLEASE TAKE NOTICE that the following Motion to Dismiss for Improper Venue will be heard on March 22, 2018, at 2:00 p.m., or as soon thereafter as counsel may be heard, in Courtroom 2, 4th Floor of this Court located at 1301 Clay Street, Oakland, California, the Honorable Haywood S. Gilliam, Jr. presiding.

Defendant, Stance Beauty Labs, LLC (“Stance”), will, and hereby does, move this Court pursuant to 28 U.S.C. § 1406(a) and Federal Rules of Civil Procedure 12(b)(3) for an order dismissing the case. This Motion is based on this Notice of Motion and Motion, the following Memorandum of Points and Authorities, the Declaration of Samuel Lubliner (“Lubliner Decl.”), the Declaration of L. Scott Oliver (“Oliver Decl.”) and the material attached thereto, the record in this matter, and any other and further papers, evidence, and argument as may be submitted in connection with this Motion.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant Stance respectfully moves this Court to dismiss this case under 28 U.S.C. § 1406(a) and Federal Rule of Civil Procedure 12(b)(3) because Stance is not incorporated, has not committed acts of alleged infringement, and does not have a regular and established place of business in California. Therefore, venue is improper in this District under *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514 (2017). This case should therefore be dismissed.¹

II. RELEVANT VENUE FACTS

Plaintiff alleges venue is proper because it visited a “Burlington Coat Factory” store in California, where it supposedly purchased two allegedly infringing hair brushes. (Complaint (“Compl.”) ¶ 27.) Plaintiff also conclusively alleges, without supporting facts, that venue is proper because Stance transacts business and distributes the infringing product in this District, where Plaintiff claims to have suffered harm. (Compl. ¶ 8.)

¹ The Court should also dismiss this case under Rule 12(b)(6) because it is undisputed that Stance did not sell the allegedly infringing product and therefore could not have infringed the patent.

1 Plaintiff's assertions are insufficient to establish proper venue. As set forth in the
 2 Lubliner Declaration, filed concurrently herewith, there are no factual grounds upon which Stance
 3 can be subject to venue in this District. Specifically:

- 4 • Stance has no physical presence in the state of California. (Lubliner Decl. ¶ 3-8.)
- 5 • Stance is a Connecticut corporation with its principal place of business in
 6 Connecticut. (*Id.* at ¶ 2; Connecticut Commercial Recording Division website,
 7 Oliver Decl., Ex. 1.)
- 8 • Stance does not have any offices or retail locations in California. (Lubliner Decl. ¶
 9 4.)
- 10 • None of Stance's books or records, and none of the officers and employees of
 11 Stance knowledgeable of those books and records, are located or reside in
 12 California. (*Id.* at ¶ 6.)
- 13 • None of Stance's officers or employees reside in or have offices in the state of
 14 California. (*Id.* at ¶ 5.)
- 15 • Stance has never attempted to become qualified or licensed to do business in
 16 California. (*Id.* at ¶ 7.)
- 17 • Stance was not at the time of filing this action and is not now a resident of
 18 California. (*Id.* at ¶ 8.)

19 **III. ARGUMENT**

20 **A. Legal Standard**

21 If venue is challenged under Rule 12(b)(3), the plaintiff bears the burden of proving that
 22 venue is proper. *See Piedmont Label Co. v. Sun Garden Packing Co.*, 598 F.2d 491, 496 (9th Cir.
 23 1979). When considering a motion to dismiss for improper venue, a court need not accept the
 24 pleadings as true and may consider facts outside of the pleadings. *See Doe I v. AOL, LLC*, 552
 25 F.3d 1077, 1081 (9th Cir. 2009). The decision to dismiss for improper venue, or alternatively to
 26 transfer venue to a proper court, is a matter within the sound discretion of the district court. *See*
 27 *King v. Russell*, 963 F.2d 1301, 1304 (9th Cir. 1992).

Venue in patent cases is governed by 28 U.S.C. § 1400(b), which provides that “any civil action for patent infringement may be brought in the judicial district: [1] where the defendant resides, or [2] where the defendant has committed acts of infringement and has a regular and established place of business.” 28 U.S.C. § 1400(b); *see TC Heartland*, 137 S. Ct. at 1518.

A corporation “resides” only in the state of its incorporation. *See TC Heartland*, 137 S. Ct. at 1519-20. As for the second avenue, “in determining whether a corporate defendant has a regular and established place of business, the appropriate inquiry is whether the corporate defendant does its business in that district through a permanent and continuous presence” *In re Cordis Corp.*, 769 F.2d 733, 737 (Fed. Cir. 1985). Specifically, “(1) there must be a physical place in the district; (2) it must be a regular and established place of business, and (3) it must be the place of the defendant. If *any* statutory requirement is not satisfied, venue is improper under § 1400(b).” *In re Cray Inc.*, 871 F.3d 1355, 1360 (Fed. Cir. 2017) (emphasis added).

In determining whether a place is “a place of the defendant,” and a court may consider “whether the defendant owns or leases the place, or exercises other attributes of possession or control over the place.” *Id.* at 1363 (emphasis added); *see XpertUniverse, Inc. v. Cisco Systems, Inc.*, No. 17-CV-03848-RS, 2017 WL 4551519, at *2 (N.D. Cal., Oct. 11, 2017) (explaining that *In re Cray* has clarified the “regular and established place of business” inquiry).

B. Stance Does Not “Reside” or Have a “Regular and Established Place of Business” in California.

Stance is incorporated in Connecticut, not California. (Lubliner Decl. ¶ 2.) Therefore, Stance does not “reside” in California. *See TC Heartland*, 137 S. Ct. at 1519-20.

Further, Stance has not committed any acts of infringement in California, because it did not sell the allegedly infringing product in California. Nor does Stance have a “regular and established place of business” in California, let alone in the Northern District of California. Stance’s principal place of business is in Connecticut. (Lubliner Decl. ¶ 2.) Stance has never maintained a place of business in California. (*Id.* at ¶ 3.) Stance does not own or lease any offices or retail locations in California. (*Id.* at ¶ 4.) None of Stances officers or employees reside in or have offices in California. (*Id.* at ¶ 5.) None of Stance’s books or records, and none of the

1 officers and employees knowledgeable of those books and records, are located or reside in
 2 California. (*Id.* at ¶ 6.) Stance has never attempted to become qualified or licensed to do
 3 business in California. (*Id.* at ¶ 7.) And Stance was not at the time of filing of this action and is
 4 not now a resident of California. (*Id.* at ¶ 8.)

5 In sum, Stance does not reside or have a regular and established place of business in
 6 California, let alone in this District. Venue is therefore improper and this case should be
 7 dismissed.

8 **C. The Court Should Dismiss, and not Transfer, this Case.**

9 “If the court determines that venue is improper, the court should either dismiss the action
 10 or, if it is in the interests of justice, transfer the case to a district or division in which it could have
 11 been brought.” *Asmodus, Inc. v. Ou*, No. 5:16-CV-03305-EJD, 2016 WL 7049244, at *1 (N.D.
 12 Cal. Dec. 5, 2016) (quoting *Cal. Brewing Co. v. 3 Daughters Brewing, LLC*, No. 2:15-cv-02278-
 13 KJM-CMK, 2016 WL 1573399 (E.D. Cal. Apr. 19, 2016)). For multiple reasons, dismissal, and
 14 not transfer, of this case is appropriate.

15 First, as established in this Motion, Stance does not transact business in California and did
 16 not sell the allegedly infringing products in this District. Therefore, Stance cannot be liable under
 17 any theory asserted by Plaintiff and dismissal is warranted for failure to state a claim under Rule
 18 12(b)(6) against Stance.

19 Second, even assuming, *arguendo*, that Stance supplied and/or sold the allegedly
 20 infringing products, which it did not, those products were allegedly also sold by codefendant
 21 Burlington Stores, Inc., a Delaware corporation that has also moved to dismiss the Complaint for
 22 improper venue. Because the claims against Burlington stem from alleged infringement by
 23 Stance, all claims should be disposed of in one case so that there are not inconsistent findings and
 24 rulings. See *Vehimax International, LLC v. Jui Li Enterprise Company, Ltd.*, No. 09-6437, 2010
 25 WL 11527371 (C.D. Cal., March 16, 2016) (citing *Continental Grain Co. v. Barge FBL-585*, 364
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1 U.S. 19, 26 (1960) (“[P]ermitting ‘two cases involving precisely the same issues ...
2 simultaneously pending in different District Courts leads to the wastefulness of time, energy, and
3 money that § 1404(a) was designed to prevent.’ Thus, litigation of related claims in the same
4 district is strongly favored because it facilitates efficient pre-trial proceedings and discovery and
5 avoids duplicitous efforts.”)).
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7 Accordingly, this case should be dismissed and refiled, if at all, where Plaintiff determines
8 that venue would be proper as to both Stance and Burlington.

9 **WHEREFORE**, Defendant, Stance Beauty Labs, LLC, respectfully requests that the
10 Court dismiss this case for improper venue under Fed. R. of Civ. P. 12(b)(3) and for such other
11 and further relief as the Court deems appropriate.
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14 Dated: December 29, 2017

Respectfully submitted,

15 ORRICK, HERRINGTON & SUTCLIFFE LLP
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17 By: /s/ L. Scott Oliver

18 L. SCOTT OLIVER

19 Attorney for Defendants,
20 STANCE BEAUTY LABS, LLC and
21 BURLINGTON STORES, INC.
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